

AUG 27 1999

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Promotion of Competitive Networks)	WT Docket No. 99-217
In Local Telecommunications Markets)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications Act)	
of 1996)	

COMMENTS OF FIRST REGIONAL TELECOM, LLC.

First Regional TeleCOM, LLC ("First Regional"), by its attorneys, submits these comments in response to the Commission's *NPRM*¹ seeking comment on competitive access to buildings, rooftops and other facilities in multiple tenant environments.

INTRODUCTION AND SUMMARY

Three principles should guide the Commissions' decisions regarding building access: (1) exclusive *facility* arrangements should be permissible, but cannot be allowed to deprive multiple tenant environment ("MTE") consumers of the ability to choose their own services and providers; (2) uniform, concrete building access rules are necessary to meet new entrants' critical need for commercial certainty; and (3) any rules governing MTEs should be consistent with the

¹ *Promotion of Competitive Networks*, WT Docket No. 99-217, Notice of Proposed Rulemaking, and *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking (rel. July 7, 1999) ("NPRM"). By Public Notice dated August 6, 1999 (DA 99-1563), the Common Carrier Bureau extended the time for filing comments on the NPRM until August 27, 1999.

fundamental competitive policy principles underlying the Telecommunications Act of 1996² and the Commission's landmark *Local Competition Order*.³

As a competitive local exchange carrier ("CLEC") specializing in serving multiple dwelling unit developments and other MTE real estate markets, First Regional believes that the Commission's rules in this proceeding will have a profound impact on the development of competition in this increasingly important segment of the telecommunications industry. First Regional fully supports the need for fair and open access to communication services for MTE end users. This requires building access rules that promote both consumer choice and increased carrier investments in MTE facilities.

Consumers and small carriers will be harmed if the Commission embarks on a path that leads to a protracted debate over the legal and constitutional basis for mandatory building access rules. The Commission should avoid such a path, especially since MTE property owners are sophisticated buyers that, in most instances, can be relied on to negotiate the most favorable deals for their commercial and residential tenants. So long as there is an alternative means for serving tenants — via inside wiring and riser cabling — the Commission should permit exclusive arrangements for the location of telecommunications equipment in MTE buildings. Customers must always have a choice of service provider; by the same token, the marketplace should be allowed to function by permitting MTE property owners to enter into exclusive arrangements with one or more carriers for collocation of equipment. The cost, complexity and uncertainty surrounding the formulation of new "equal access" and collocation rules for MTE building access are unnecessary and counterproductive where every carrier is guaranteed at least one alternative means of reaching MTE end users.

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151.

In other words, if any other carrier can access MTE end users by purchasing an incumbent LEC unbundled loop and using existing intra-building wiring, there is no policy or legal deficiency with allowing one carrier to negotiate for exclusive rights for placement of telecommunications equipment on the building premises. First Regional recognizes that fixed-wireless CLECs may have special needs related to their choice of technology. We are not advocating that wireless providers be denied access to MTE environments. On the other hand, the time and complexity associated with crafting rules for these situations, along with the difficult legal problems they present, should not deflect from the need for concrete, uniform building access rules for wireline CLECs. First Regional believes that delay is the enemy of competitive entry in the local exchange market. Our proposal therefore seeks to balance consumers' choice of carrier with the market-based need for carriers and property owners to maximize the return on their investment, without embroiling the Commission in common carrier type regulation of private real estate developers.

BACKGROUND

First Regional provides innovative bundles of communications services to residents and small businesses within multi-dwelling units that are designed specifically to allow real estate owners to differentiate their MTE properties. The company's service bundles include local and long distance telephone services, dial-up Internet services, high-speed Internet services, and video-on demand services. These services are augmented by a proprietary Internet Web Neighborhood™ portal tailored to each MTE. Formed in 1997, the company plans to offer services nationwide, and currently offers services throughout the eastern United States. First

³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499 (1996).

Regional provides services through the resale of ILEC services and collocation of communications equipment within MDUs.

The Commission seeks comment on carriers' experiences regarding the provision of telecommunications services in multiple tenant environments and on preferred methods of operation.⁴ First Regional's experiences with building owners and property managers have varied widely, but in no case have building owners not had the best interest of their tenants in mind. In deploying services to consumers in MTEs, the most difficult challenges facing the company have been navigating the regulatory obstacles that vary from state to state and working with the ILEC, not dealings with building owners to locate equipment or access customers. Furthermore, increasingly the market is becoming more evolved and long-term exclusive contracts are less frequently available as building owners become more familiar with their alternatives and gain experience in dealing with telecommunications service providers. In general, even as a small carrier, First Regional has had open access to building owners and the tenants of their building. This is not to say that First Regional has not confronted situations where another carrier has already had an exclusive agreement of one type or another. While this makes serving the building more difficult, and perhaps not feasible, it is simply an anticipated part of free markets and competition. In these situations, First Regional examines alternatives to offer portions of its service offerings or use different delivery methods.

There is no single answer to the question of what is the preferred arrangement or method of operations.⁵ When serving consumers in MTEs, First Regional uses a variety of methods to access the consumer, depending on the particular situation. In some instances, First Regional may have no relationship with the property owner, while in others it may enter into an exclusive

⁴ NPRM ¶ 31, 34.

⁵ NPRM ¶ 34.

facility location agreement, exclusive marketing agreement and/or revenue sharing arrangement with properties. The type of arrangement depends on a wide variety of factors such as the size of the property, the type of services to be provided, the equipment necessary, and the size of the property management group to name a few.

DISCUSSION

The Commission has recognized that one of the primary benefits of the 1996 Act and its progeny is that they have allowed individual consumers the ability to access the providers and services of their choice. As the NPRM notes, “[t]he most immediate beneficial effect of the introduction of competition into local telecommunications markets, even on a small scale, is to make competitive alternatives available to individual subscribers.”⁶ Yet, as the Commission also recognized, in certain market sectors, “our broadly directed efforts to date have resulted in only relatively limited competition.”⁷

In particular, the multiple tenant environment is one of the market sectors that has not yet fully benefited from widespread competition among providers and services. This slow emergence of competition in this sector is particularly problematic given that a significant and growing percentage (28%) of all nationwide housing, in addition to many small businesses, are located in residential MTEs.⁸ As the Commission correctly recognizes, “[i]f a significant portion of these housing units and businesses is not accessible to competing providers, that fact could seriously detract from local competition in general and from the availability of competitive services to ‘all Americans.’”⁹ Accordingly, First Regional applauds the Commission’s

⁶ NPRM ¶ 18.

⁷ NPRM ¶ 19.

⁸ NPRM ¶ 29.

⁹ NPRM ¶ 29, *citing* 47 U.S.C. §§ 151, 706.

commitment to ensuring that customers located in multiple tenant environments have access to their choice of telecommunications service providers”¹⁰

The NPRM seeks comment on whether or not to require property owners to provide non-discriminatory access to their property. The NPRM inquires on whether “building owners who allow access to their premises to any provider of telecommunications services should make comparable access available to all such providers” and “whether adoption of this principle may be necessary to ensure that consumers in multiple tenant environments have the ability to access the service provider of their choice.”¹¹ Recognizing the competing demands arising in the MTE market, however, the Commission also seeks comment on whether it should, at least in some circumstances, permit exclusive arrangements because these contracts could promote a competitive market by allowing carriers to recoup their costs and may result in competition that would not have existed otherwise.¹²

A. Exclusive Building Access and Consumer Choice

First Regional agrees with the Commission that enhancing MTE consumers’ choices among providers is the driving principle that should guide the Commission’s decisions with regard to rules on access to MTEs. At the same time, First Regional recognizes that there are important benefits provided by exclusive arrangements with property managers. Specifically, such agreements allow new entrants identifiable and predictable sources of revenue, which is critical for new companies with reduced cash flows. Furthermore, these agreements enable carriers to more confidently make significant investments in equipment to be located in a building. In addition, the capital markets that new companies are dependent upon view such agreements as an

¹⁰ NPRM ¶ 64.

¹¹ NPRM ¶ 53.

¹² NPRM ¶ 60.

important positive signal in the development of a young company, and often base their investments accordingly.

Exclusive contracts between building owners and CLECs do not necessarily prevent consumers from choosing another service provider. The solution lies in differentiating between nondiscriminatory access to inside wiring and riser cabling — which are crucial points for access to all MTE customers — and exclusive agreements that govern the placement of equipment, marketing arrangements and telecommunications revenue sharing opportunities. If property owners are prohibited from granting exclusivity for use of inside wiring and riser cabling, every carrier will be guaranteed at least one alternative path to MTE tenants. In these circumstances, exclusive arrangements for use of building conduits, telecommunications “closets” and other building facilities should be permissible. Indeed, in order to encourage investment in the MTE market, the Commission should affirmatively encourage these sort of arrangements by crafting rules that allow carriers to fashion exclusive arrangements with building owners so long as these arrangements do not preclude tenants from selecting another CLEC as their local service provider.

As the Commission has stated, “competitive providers must have the ability to access their potential customers. If only a limited class of consumers can be accessed . . . then it is unlikely that competition will grow to the point where it will effectively eliminate the incumbent market power.”¹³ Exclusive facility and revenue sharing arrangements are entirely consistent with these conclusions. Competing providers who are not able to locate their equipment in MTE buildings can still reach customers by collocating at the ILEC central office and using a combination of unbundled loop UNE and intra-building inside wiring. There is little reason to believe

¹³ NPRM ¶ 25.

that the opportunity for building exclusives will be used to harm consumers, as there are significant incentives for property managers to seek out the best terms on behalf of their tenants, as such terms will enhance the overall attractiveness of the real estate. Moreover, this incentive is not diminished in the instances where the property managers have negotiated revenue sharing agreements with tenants because of the ability of consumers to utilize another provider (which is assured by mandating access to inside wiring).

The alternative to such an approach would be to craft rules governing the terms and conditions, including price, for an “equal access” obligation imposed on all MTE property owners.¹⁴ This would effectively treat building owners as common carriers, raising some very controversial and difficult legal issues. By distinguishing between access to inside wiring and the exclusive ability to place equipment and use other building facilities, the Commission could avoid deciding the very complex jurisdictional and constitutional concerns that are more relevant to the determining the manner in which wireless carriers should be guaranteed a means to compete in the MTE market.¹⁵ Since wireless providers, in particular, need access to rooftop space and are unlikely to be satisfied with CO collocation as an alternative, First Regional believes the Commis-

¹⁴ The price for nondiscriminatory building access is likely to be a contentious and long-term issue. By analogy, in the payphone context, it has been true for years that payphone service providers (“PSPs”) are required to unblock “dial around” access to carriers other than the presubscribed carrier with which the PSP has a contractual relationship. Despite the provisions of Section 256 of the 1996 Act requiring “fair” competition to PSPs for dial-around calls, the development of such a compensation system has been fraught with controversy, and several appellate reversals, as part of a still-incomplete Commission process. The development of terms and conditions for building access would clearly be far more difficult, and more time consuming, than payphone compensation.

¹⁵ In considering whether or not to require building owners that have allowed one provider to access their premises to also allow all other providers access, the Commission inquired as to whether or not it had the statutory authority to issue such a requirement. If such authority did exist, the Commission inquired as to whether such a regulation would be classified as a constitutional “taking,” either *per se* or regulatory, and thus necessitate that the Commission ensure just compensation for that taking. NPRM ¶¶ 56-60.

sion should separate consideration of these issues.¹⁶ Addressing the constitutional issues associated with the wireless carrier building access problems will undoubtedly lead to uncertainty, confusion and delay, all of which will harm smaller CLECs, like First Regional, that cannot weather a long period in which the basic rules for building access are unsettled.

B. Consistent Rules Will Minimize Market Uncertainty

The Commission should establish uniform and concrete ground rules that would allow MTE providers commercial certainty as to the nature and manner of building access that they will have in order to plan and provide their service offerings. In order to formulate business strategies, plan services offerings and meet customer expectations, it is critical that service providers have the ability to rely on a consistent rules and parameters regarding building access. Moreover, such certainty is particularly important for new entrants faced with the burden of demonstrating consistency and certainty to the capital markets on which new entrants depend for their existence.

One of the ways in which the Commission can ensure such consistency is to set a clearly defined demarcation point for access to the inside wiring. As the Commission has indicated, under current rules, “the demarcation point in multiple unit premises may be established at any number of places depending on the date the inside wiring was installed, the local carrier’s reasonable and nondiscriminatory practices, and the property owners’ preferences.”¹⁷ As a result of this variability, incumbent LECs have the opportunity to set demarcation points that are inconvenient or difficult to access, or even difficult to identify. In manipulating the leverage that

¹⁶ Because fixed wireless carriers have chosen an access technology that requires them to locate equipment on the rooftops, exclusive rooftop access agreements may preclude a second fixed wireless carrier from serving the building using wireless technology. It does not, however, preclude consumers from a choice of a carrier. Therefore, the Commission should narrow the issue to look at exclusive wireless rooftop access agreements, and not create uncertainty for wireline carriers or unnecessarily attempt to impose regulations on building owners that are overly broad and constitutionally suspect.

¹⁷ NPRM ¶ 36

they have to set the demarcation point, incumbents then are able to skirt their access obligations in spirit, albeit while claiming a good-faith effort. Moreover, such clear and decisive action by the Commission is necessary in order to ensure that competitors can have consistency in their national rollout, especially when dealing with national property managers, and is also needed to ensure that there is no room for the incumbent LECs to avoid their obligations by gaming the regulatory process and trying to undo at the state commission level, the rules determined by this Commission.

C. Maintain ILEC Obligations Under the Local Competition Order

The rules that the Commission develops for MTE providers should also be consistent with competitive principles of the 1996 Act and the *Local Competition Order* implementing that Act. The *Local Competition Order* has had a remarkable impact in changing the local telecommunications market from one with a few dominant players with no real competitive threats to one in which numerous entrants stand poised to interject competitive challenges. As the Commission has recognized, the “changes wrought by the 1996 Act have helped engender significant progress toward meaningful competition in local telecommunications markets, including markets for advanced services.”¹⁸

Under both the 1996 Act the *Local Competition Order*, incumbents LECs are required to provide competitors with access to inside wiring and cable riser that they own. In Section 224 of the Act, incumbent LECs must provide competitors with nondiscriminatory access to poles, ducts, conduits, and rights-of-way that they own or control. Such conduits would extend to inside wiring and cable riser, where controlled by an ILEC in an MTE property. Likewise, in holding that incumbents should provide the Network Interface Device (“NID”) as an unbundled

¹⁸ NPRM ¶ 11.

network, the Commission determined that “[w]hen a competitor deploys its own loops, the competitor must be able to connect its loops to customers’ inside wiring in order to provide competing service, especially multi-tenant buildings.”¹⁹

These same principles should be applied to MTE locations, such that incumbent LECs must be permitted to allow nondiscriminatory access to all conduit, riser cable and other facilities that control in MTE properties. In doing so, the Commission should reiterate that the rules governing building access turn on the fundamental goals of ensuring that the key legacy gateways and facilities to serving customers — long dominated by the incumbent providers — do not stand as obstacles to competition. In essence, “[i]n order for competitive networks to develop, the incumbent LECs’ bottleneck control over interconnection must dissipate.”²⁰ For MTE providers, significant among these obstacles are the significant delays in getting interconnection agreements needed to even begin provisioning, unnecessary errors in billing affecting competitors’ abilities to bill their own customers as well as assess their own roll-out costs, and poor installation of providers equipment. It is particularly important that the Commission insure that installation occurs at a high level of quality and accuracy, given that competitors may only have the ability to utilize, and send signals over, the inside wires and may not have access to the property managers’ premises.

CONCLUSION

Building owners should not be permitted to restrict their tenants to a particular telecommunications service provider, but by the same token should also not be prohibited from entering into exclusive arrangements with CLECs for facilities collocation, marketing and tele-

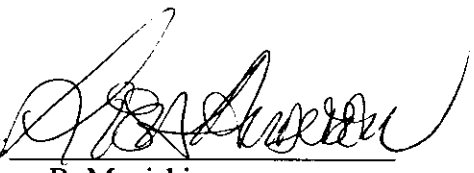
¹⁹ *Local Competition Order* ¶ 392.

²⁰ NPRM ¶ 22.

communications revenue-sharing. The Commission should minimize uncertainty and promote competitive investment in the MTE market by avoiding the difficult issues associated with treating building owners as common carriers and by dealing separately with the more complex problems confronting wireless providers. Incumbent LECs should be required to provide nondiscriminatory access under the 1996 Act, at a clearly defined demarcation point, to all riser conduit, cabling and other intra-building "entrance" facilities they own or control.

Respectfully submitted,

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Dated: August 27, 1999

CERTIFICATE OF SERVICE

I, Stanley M. Bryant, do hereby certify that on this 27th day of August, 1999, I have served a copy of the foregoing document via messenger to the following:


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